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ORIGINAL

February 6, 2001

VIA COURIER

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
CY-B402
Washington, D.C. 20554

Re: Application by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verzion Enterprise Solutions) and Verizon Global Networks, Inc. for Authorization to Provide In-Region InterLATA Services in Massachusetts, CC Docket No. 01-9

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding pursuant to the Commission's January 16, 2001 Public Notice Requesting Comments are an original, one paper copy, and a diskette copy of the Comments of A.R.C. Networks, Inc.

Please date stamp and return the enclosed extra copy of this filing in the self-addressed, postage prepaid envelope provided. Should you have any questions concerning this filing, please do not hesitate to call us.

Respectfully submitted,

Harisha J. Bastiampillai

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Verizon New England, Inc.	)	
Bell Atlantic Communications, Inc.	)	
(d/b/a Verizon Long Distance),	)	CC Docket No. 01-9
NYNEX Long Distance Company	)	
(d/b/a Verizon Enterprise Solutions)	)	
and Verizon Global Networks, Inc., for	)	
Authorization to Provide In-Region,	)	
InterLATA Services in Massachusetts	)	

COMMENTS OF A.R.C. NETWORKS, INC.

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February 6, 2001

SUMMARY

Verizon Communications reported last week that it added 190,000 DSL lines in the fourth quarter of 2000, bringing its total amount of DSL lines to 540,000, an increase of more than 500% over the number in service at the end of 1999.[1] Meanwhile, more and more competitive data providers are exiting the Massachusetts market. These two facts are hardly coincidental, particularly given the problems in DSL provisioning that led Verizon to withdraw its initial application in the first place.

This Commission is clearly cognizant of the realities of the DSL marketplace as it recently issued its *Line Sharing Reconsideration Order,* which seeks to eliminate many of the anticompetitive practices of ILECs that were precluding competitive deployment in the advanced services market. In particular, the Commission recognized that if true competition is to develop in regard to advanced services it needs to facilitate the entry of integrated competitive providers into the marketplace. ILECs such as Verizon have used their ability to provide voice and data services over the same line to fuel their rapid deployment of DSL services. Meanwhile, CLECs have been battling onerous and discriminatory restrictions on their ability to provide similar service.

These Comments chronicle the experience of A.R.C. Networks, an Integrated Communications Provider offering end-to-end services including broadband data and voice telecommunications services in major markets including the greater Boston metropolitan area. While A.R.C. is constructing its own state-of-the-art IP network, it is utilizing a market strategy

[1] *Verizon Communications Post Strong Results for the Fourth Quarter and 2000*, Verizon News Center Press Release at pp. 1-3 (February 1, 2001). http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=48888

that relies in part on the resale of ILECs' advanced services and providing voice services utilizing the UNE-P platform.

A.R.C. was poised to begin its rollout of DSL service resold from Bell Atlantic in Massachusetts last year when it was informed by Bell Atlantic that because of the Bell Atlantic/GTE merger, all responsibility for the provisioning of ADSL service for resale would be transitioned to Verizon's data affiliate. When the transition took place, A.R.C.'s orders were rejected because the data affiliate was not operationally prepared to process the orders. When the data affiliate finally declared that it can accept orders it placed discriminatory conditions on the resale of the DSL service. For instance, in order for A.R.C.'s customers to purchase ADSL service (resold ADSL service from Verizon), they were required to purchase a retail line from Verizon; thus, A.R.C. could not offer to its customers DSL service with their voice service whereas Verizon's customers could purchase both DSL and voice service from Verizon. In addition, A.R.C. was required to use a separate interface (initially manual) from its wholesale interface to place the orders for DSL service increasing their costs even more. These discriminatory and unreasonable conditions effectively precluded A.R.C.'s ability to resell DSL service, and it had to withdraw its DSL service offering. Verizon's provisioning of resale DSL service clearly violated Section 251(c)(4) of the Act, and Item 14 of the Competitive Checklist. Verizon's sole defense was that under the Merger Conditions its data affiliate was not required to resell DSL service, so A.R.C., and other CLECs, had to make do with this substandard offering.

The U.S. Court of Appeals for the D.C. Circuit recently rejected this type of circumvention of statutory requirements that Verizon was undertaking. Verizon will undoubtedly attempt to seek pardon for its violations of Section 251(c)(4) of the Act by citing to language from the Commission's recent approval of SBC's application for Section 271 authority

in Kansas and Oklahoma. In that order, the Commission said it would excuse SBC's non-compliance with statutory requirements on this point. The Merger Conditions cannot, however, grant Verizon a safe harbor from its requirements with regard to resale; as this Commission has unequivocally stated, compliance with Merger Conditions does not reflect or constitute any compliance with statutory requirements, such as those provided by Section 251. Excusing Verizon's non-compliance would revisit the same infirmities that troubled the D.C. Circuit in regard to ILEC circumvention of statutory requirements. In addition, Verizon has had ample time to affirm that it will now comply with those requirements, but has not done so. The Commission should impose such affirmation as a pre-condition to any grant of Section 271 authority on such an affirmation, and if it is not forthcoming, then Verizon's application should be rejected.

A.R.C. was one of the CLECs that supported Bell Atlantic's application for 271 authority in New York, and it did so with the belief that Bell Atlantic would remain true to its statutory obligations. The intervening period has proven otherwise, and this Commission should require an unequivocal declaration from Verizon that it will come into compliance with its statutory obligations in regard to resale of DSL service before Section 271 authority is granted.

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and Verizon Global Networks, Inc., for	)	
Authorization to Provide In-Region,	)	
InterLATA Services in Massachusetts	)	

COMMENTS OF
A.R.C. NETWORKS, INC.

A.R.C. Networks, Inc. ("A.R.C.") by undersigned counsel and pursuant to the Public Notice issued January 16, 2001, submits these Comments concerning the above-captioned application of Verizon New England, Inc, Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks, Inc. ("*Verizon Application*") filed on January 16, 2001. For the reasons stated below, the Commission should deny Verizon's application to provide interLATA services in the Commonwealth of Massachusetts.

I. BACKGROUND

A.R.C. is a subsidiary of InfoHighway Communications Corporation and is a leading Integrated Communications Provider offering end-to-end services including broadband data and voice telecommunications services primarily to businesses and tenants of multi-tenant units in major markets in the northeastern and southeastern United States, including the greater Boston

metropolitan area. A.R.C., marketing under the "InfoHighway" brand name, provides competitively priced high-speed data and Internet services, principally using Digital Subscriber Line ("DSL") technology; web services; local and long distance telephone services; and network design and wiring services. A.R.C. is currently building an IP-based super-regional network capable of delivering a wide range of broadband data, *e.g.* DSL, and voice services. While it is deploying its network, A.R.C. is utilizing a market entry strategy that relies in part on the resale of ILECs' advanced services and providing voice services utilizing the UNE-Platform.

There has been a long history, dating back to August 1999, of A.R.C.'s attempts to obtain resold DSL services from Verizon and its predecessor company, Bell Atlantic.[2] It is necessary to recapitulate this history briefly in order to explain the nature of A.R.C.'s problems with Verizon's provisioning of wholesale advanced services. To support its provision of DSL service over resold Verizon DSL lines, A.R.C. first ordered a DS-3 from Verizon to connect to Verizon-NY's ATM cloud in August, 1999. This DS-3 was turned up in November, 1999. A.R.C.'s first resold ADSL line was turned up in March, 2000. On April 6, 2000, Verizon sent a letter to A.R.C. and other customers, notifying A.R.C. that after July 1, 2000, "responsibility for the provisioning of ADSL service for resale will be transition[ed] to the separate data affiliate and TIS [Telecom Industry Services] will no longer be directly involved."

During the period from March to June, 2000, A.R.C. began its rollout of DSL service resold from Verizon-NY. After a successful rollout in New York, A.R.C. was planning to roll out the DSL service resold from Verizon everywhere in its service area, including Massachusetts, Pennsylvania, New Jersey, Connecticut, Maryland, and the District of Columbia. Other than the April 6, 2000 letter quoted above, Verizon made no effort during that time period

[2] For consistency, we will refer to Bell Atlantic hereinafter as Verizon.

to inform A.R.C. how the transition would take place, or to inform A.R.C. of any action A.R.C. should or could take to facilitate the transition. A.R.C.'s rollout came to an abrupt halt with Verizon's July 1 "transition" to its "separate data affiliate" Bell Atlantic Network Data Incorporated (BAND).[3] The halt in A.R.C.'s rollout was caused by one simple fact: BAND refused to provision new resold DSL lines because it lacked the operational processes, and any OSS to do so. At the time, A.R.C. personnel were informed by BAND personnel that BAND was "not prepared" to take over the provisioning of resold DSL service and, as one of Verizon's representatives stated, "BAND had clearly screwed this up."

Ultimately, BAND agreed to accept new orders from A.R.C. and other resellers. There were, however, significant conditions imposed upon such new orders and the continuation of existing accounts. For A.R.C. or another reseller to order DSL service from BAND, the end user customer had to order a retail line from Verizon-NY. This requirement meant that A.R.C. could not offer to its customers A.R.C.'s DSL service (ADSL service resold from Verizon-NY combined with A.R.C.'s ISP services, such as E-Mail, DNS, Hosting, etc.) together with their voice service line from A.R.C., whereas Verizon could offer DSL on a line sharing basis over the customer's existing voice line from Verizon retail. As such, the requirement of a retail voice line from Verizon was a shocking and anticompetitive repudiation of the FCC's line sharing requirements, designed to assure that A.R.C. and other resellers could not realistically offer competitive DSL service on a resale basis.

Further, this requirement meant that the end user customer had to receive a separate retail bill for dialtone service from Verizon-NY. Verizon refused to include these retail bills on A.R.C.'s wholesale bill. While Verizon offered to mail the paper bills to A.R.C. instead of to the

[3] Verizon's data affiliate is now named Verizon Advanced Data Incorporated ("VADI").

end users, this approach is unworkable from the reseller's point of view. It requires a reseller with 1000 customers to open up and process 1000 paper bills for the 1000 voice lines, instead of receiving a single consolidated electronic bill. Moreover, because BAND treated this order of a voice line as a retail purchase, the reseller was required to pay the retail rate (without receiving the benefit of the 19.1% avoided cost discount mandated by the New York Public Service Commission), and to pay sales tax on the voice line.

In addition, A.R.C. and other resellers were denied the ability to use the same wholesale interfaces for pre-ordering, ordering, provisioning, repair, billing functionality that they were already using for other services. Instead, they were required to use a separate proprietary interface established by Bell Atlantic without any regard to established industry standards for wholesale interfaces or without any collaboration from its wholesale customers, such as A.R.C. The requirement of using two separate interfaces obviously adds considerable cost for a reseller seeking to do business with Verizon. These requirements were discriminatory, in that Verizon-NY knowingly ignored existing wholesale interfaces, and the requirements of existing customers already using those interfaces, and established proprietary interfaces that were designed solely for Internet Service Providers such as AOL, purchasing direct from BAND. The proprietary interface was not ready at the time of the transition to BAND nor was it ready later in the year.

The "transition" to BAND thus created two sets of problems for A.R.C. In the short run, the provisioning of several orders that were in the midst of the provisioning process was substantially delayed, while several other firm orders that A.R.C. had in hand on July 1 could not be processed at all and therefore had to be cancelled. The long run problem was, however, more serious. In fact, A.R.C. ultimately concluded that the combination of the multiple interfaces and the required retail pricing and billing of the voice line (including sales tax) made it infeasible for

A.R.C. to continue to offer resold Verizon DSL service. A.R.C. has therefore reluctantly notified its DSL customers that it was serving via Verizon resold ADSL service that A.R.C. will no longer be able to provide this service.

A.R.C. did not, however, reach this conclusion without considerable thought and analysis. Nor did it fail to endeavor to induce Verizon to change its policies. Quite to the contrary, it made substantial efforts from the first time that BAND advised it of these conditions to encourage BAND to modify them so as to make it economically feasible for A.R.C. to resell BAND DSL service, specifically raising with BAND personnel all of the problems with BAND's offering that are set forth in these Comments. Unfortunately, A.R.C. was met at every turn with resistance from BAND. The essence of BAND's position was that, under the merger conditions, BAND was not required to resell advanced services at all, and therefore, even if its resale offerings were unworkable, A.R.C. was not entitled to a more workable offering.

For example, A.R.C. asked its trade association, ASCENT, to raise these issues with BAND in writing. Amy McIntosh, then President and CEO of BAND, responded on July 21, 2000, conceding that the "interface procedures . . . between BAND and BA-NY may be cumbersome, but they are designed to meet the Merger Conditions." Ms. McIntosh also refused to provision orders over resold POTS or UNE-P loops, claiming that BAND did not provision its own customers that way, using line sharing instead.

It should be noted that while much of the above history pertains to A.R.C.'s problems with Verizon NY, they are of equal applicability and relevance to Massachusetts, as Verizon states that it makes resale services available in Massachusetts in the same manner as it does in

New York.[4] A.R.C. was poised to begin its rollout of resold DSL service in Massachusetts when it ran into the initial refusal, and then subsequent "conditioned" acceptance," of orders for resold DSL service by BAND. Verizon's actions, therefore, precluded A.R.C.'s entry into the advanced services market in Massachusetts and denied the consumers of the Commonwealth a viable choice in regard to integrated providers of communications services. The fact is of particular relevance at this time given the cessation of operations of several DSL providers operating in Massachusetts, including Prism, Digital Broadband, and HarvardNet,[5] and others.

II. VERIZON'S ACTIONS VIOLATE SECTION 251(c)(4) OF THE ACT AND CHECKLIST ITEM 14

Section 251(c)(2)(B)(xiv) of the Act requires a Bell Operating Company to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[6] Section 251(c)(4) of the Act imposes a "duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[7] It also imposes a duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . . ."[8] Restrictions on resale are presumed to be unreasonable unless the LEC proves to the state commission that the restriction is reasonable and non-

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[4] *Application of Verizon New England, Inc, Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks, Inc.to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 00-176, Verizon Application at p. 40 (September 27, 2000)("*Verizon Initial Application*").

[5] HarvardNet is still in business but no longer provides DSL service.

[6] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, ¶ 252 (January 22, 2001)("*SBC KS/OK Order*").

[7] 47 U.S.C. § 251(c)(4)(A)

[8] 47 U.S.C. § 251(c)(4)(B)

discriminatory.[9] Verizon, through its advanced services affiliate, BAND, violated both parts of this provision. BAND's initial refusal to provide new resold lines due to its operational shortcomings violated Section 251(c)(4)(A).[10]

The conditions that BAND subsequently imposed upon new orders for resale DSL lines and for the continuation of existing accounts violated Section 251(c)(4)(B) in that these conditions were both unreasonable and discriminatory. First, the requirement that for a reseller to order DSL service, its end user customer had to purchase a retail line from Verizon is clearly discriminatory. In effect, it precluded A.R.C. from offering integrated voice and DSL service which, as we described above, is one of the central features of its product offering. Meanwhile, Verizon's retail division could offer DSL on a line sharing basis over the customer's existing voice line from Verizon. Verizon has been provisioning Infospeed, its retail line sharing service, for more than a year and has provisioned many thousands of shared lines.[11] Thus, Verizon fails to meet the requirement that it provide for resale "the telecommunications services it furnishes its own retail customers, and competing carriers are able to sell these same services to the same customer groups, in the same manner."[12]

To compound the unreasonableness of Verizon's conditions on resale, the end user customer has to receive a separate retail bill for dialtone service from Verizon, and A.R.C. was required to pay retail rates on the voice line. Thus, Verizon was not providing A.R.C. wholesale

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[9] *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, FCC 00-238 at ¶ 387 (June 30, 2000) ("*SBCTX Order*").

[10] The comment of Verizon's representative that "BAND has clearly screwed this up" is an express admission of this fact.

[11] *Investigation by the Department on its own motion as to the propriety of the rates and charges set forth in M.D.T.E. No. 17 filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, to become effective October 2, 2000,* MA DTE Docket No. 98-57 Phase III, Order at p. 46 (Sept. 2000)("*MA Line Sharing Order*")

[12] *SBCTX Order* at ¶ 389.

rates for the same service it was providing to its retail customers. Instead, it was requiring A.R.C. to purchase this hybrid Verizon voice/resale DSL product with the voice portion of the product being priced at non-wholesale rates.[13]

In addition, A.R.C. was denied the ability to use the same wholesale interfaces that it was already using for other services. Instead, it was required to use a separate proprietary interface established by Verizon without any regard to established industry standards for wholesale interfaces or without any collaborative input from its wholesale customers. Thus, while Verizon claims that it is working to provide updated OSS interfaces for CLECs based on the most recent set of standards, and that these updated versions will use uniform fields and formats to make it even easier for CLECs to integrate their pre-ordering and ordering systems,[14] such a development is undermined by requiring CLECs such as A.R.C. to use a totally different interface to order resold DSL products. Also while CLECs may have significant input on the nature of the wholesale interfaces through the Collaborative and Change Management processes, such input is lacking for this retail interface.[15]

The use of two different interfaces further drives up the cost for a reseller seeking to do business with Verizon. It is no wonder then that A.R.C. ultimately concluded that the combination of these multiple interfaces and the retail pricing and billing of the voice line effectively precluded it from offering resold Verizon DSL service.

III. THE MERGER CONDITIONS PROVIDE NO SAFE HARBOR FOR VERIZON

Verizon's defense to this bald-face violation of Section 251(c)(4) is that under the conditions of Bell Atlantic's merger with GTE, it was not required to resell advanced services at

[13] The resale discount in Massachusetts is 24.99% when a reseller uses Verizon-MA's OS and DA, and 29.47% without these services. CC Docket No. 00-176, Massachusetts Department of Telecommunications and Energy Evaluation at p. 391 (Oct. 16, 2000).

all, so A.R.C. was not entitled to a more workable offering.[16] Under the terms of the *BA/GTE Merger Order*, Verizon was allowed to offer advanced services through an advanced services affiliate. Under the Merger Conditions as drafted, if the separate Advanced Services affiliate does not deviate from the requirements of 47 U.S.C. § 272(b), (c), (e), and (g), such separate affiliate shall not be deemed a successor or assign of a BOC or incumbent LEC for purposes of applying 47 U.S.C. §§ 153(4) or 251(h).[17] Section 251(h) defines "incumbent local exchange carrier" so the effect of this provision would be to allow the affiliate to avoid the requirements imposed by the Act on incumbent local exchange carriers which would include the requirements of Section 251(c).

This circumvention of the statutory requirements was unequivocally rejected by the U.S. Court of Appeals for the D.C. Circuit in *Association of Communications Enterprises v. Federal Communications Commission.*[18] In *ASCENT* the court addressed the validity of an identical condition applied in the merger of SBC and Ameritech. The court held that "the Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services." The court emphasized that:

> Congress has specified when conditions justify allowing an ILEC to provide telecommunications services[19] without § 251(c)(4)'s duties. And it has specified when an ILEC may avoid the Act's burdens by providing telecommunications services through a separate affiliate, and what services that affiliate may provide. In short, the Act's structure renders implausible the notion that a wholly owned affiliate providing telecommunications services with equipment originally owned

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[14] *Verizon Initial Application* at p. 44
[15] *Id.* at 53-54.
[16] *See, Applications of GTE Corp., Transferor, and Bell Atlantic Corp.., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221 (rel. June 16, 2000) ("*BA/GTE MergerOrder*")
[17] *BA/GTE Merger Order*, Merger Conditions, ¶ 3.
[18] *Association of Communications Enterprises v. Federal Communications Commission*, No. 99-1441, 2001 WL 20519 (D.C. Cir. Jan. 9, 2001)("*ASCENT*")
[19] The court noted that the Commission had determined that advanced services are telecommunications services. *Id.*

> by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent, should be exempted from the duties of that ILEC parent.[20]

This court noted the while this case "arose out of a merger proceeding, the Commission's order has a broader application" as any "ILEC would be entitled, according to the Commission's logic, to set up a separate affiliate and thereby avoid § 251(c)'s resale obligations."[21] Thus, its holding clearly invalidates any defense Verizon may have to this section 251(c) violation.

The Commission addressed this court decision in its recent *SBC KS/OK Order* and stated it would not penalize SWBT for nonconformance with the mandates of Section 251(c)(4). The Commission stated that:

> We note that the Court of Appeals for the District of Columbia has recently issued a decision overturning the Commission's determination, in conjunction with the Ameritech-SBC merger, that the merged company could avoid the resale obligation of section 251(c)(4) for the sale of advanced services if it provided those services through a subsidiary. *Association of Communications Enterprises v. Federal Communications Commission*, 2001 WL 20519 (D.C. Cir. Jan. 9, 2001). At the time SWBT filed this application, it was obligated to comply with the Commission's rules regarding the provision of advanced services through affiliates. In its review of the Commission's decision on the New York 271 application, the D.C. Circuit affirmed the Commission's view that "compliance with Commission orders cannot serve as a basis for rejecting an application." *AT&T Corp. v. FCC*, 220 F.3d at 630. We believe that, consistent with this ruling, SWBT should not be faulted for its efforts to comply with a Commission order in effect at the time of the application, even though the order was subsequently vacated. At the same time, we expect SWBT to act promptly to come into compliance with section 251(c)(4) in accordance with the terms of the court's decision. We anticipate issuing an order in the very near future to address this issue.[22]

Verizon will certainly seize upon this language to seek a similar type of pardon. Unlike, SWBT's application, however, Verizon has already had time to address the ruling, and will have

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[20] *Id.*
[21] *Id.*
[22] *SBC KS/OK Order* at ¶ 252, n. 768.

substantial additional time to address this ruling prior to expiration of the 90-day statutory period.[23] We urge the Commission not to adopt the same approach here that it did in the *SBC KS/OK Order*. Such an approach would only compound the past injury to competition in advanced services that resulted from allowing Verizon to circumvent this vital statutory obligation in the first place.

As this Commission specifically noted in applying the merger conditions, these conditions do not "reflect or constitute any determination or standard regarding Bell Atlantic/GTE's compliance or non-compliance with 47 U.S.C. §§ 251, 252, 271, or 272 . . . ."[24] The Commission went on to add:

> The intent of these Conditions is to address concerns raised by the proposed merger. To the extent that these Conditions impose fewer or less stringent obligations on Bell Atlantic/GTE than the requirements of any past or future Commission decision or any provisions of the 1996 Act or the Commission or state decisions implementing the 1996 Act or any other pro-competitive statutes or policies, nothing in these Conditions shall relieve Bell Atlantic/GTE from the requirements of that Act or those decisions. The approval of the proposed merger subject to these Conditions does not constitute any judgment by the Commission on any issues of either federal or state competition law. In addition, these conditions shall have no precedential effect in any forum, and shall not be used as a defense by the Merging Parties in any forum considering additional procompetitive rules or regulations.[25]

If the Commission were to excuse Verizon's blatant non-compliance with Section 251(c)(4), the Commission would be doing the very thing it claimed in the merger conditions it would not do. The Commission would be stating that compliance with the merger conditions (even ones that have been voided) does satisfy Section 251 requirements and does relieve

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[23] Subsequent to the ruling, A.R.C. has sent a letter to Lawrence Babbio, Jr., Vice Chairman and President of Verizon Communications, Inc., requesting, among other things, that Verizon immediately permit A.R.C. to sell Verizon's DSL service over its resold lines, using wholesale interfaces, in Massachusetts. If Verizon does not affirm in this proceeding that it will meet its resale obligations in regard to advanced services, the Commission should deny Verizon's application for failure to meet Checklist Item 14.

[24] *BA/GTE Merger Order*, Merger Conditions, page 1.

[25] *BA/GTE Merger Order*, Merger Conditions, p. 1, fn. 2.

Verizon of its statutory requirements. Such a finding would invoke the same concerns that troubled the D.C. Circuit in *ASCENT.*

The D.C. Circuit's holding in *AT&T Corp. v. FCC*[26] is inapposite to the situation here as in that case the ILEC was complying with a Commission order interpreting and applying the requirements of the Telecommunications Act, specifically whether use restrictions on combinations of unbundled loops and transport complied with Section 251(c). The Commission, however, has explicitly said that the merger conditions do not constitute any determination of what Section 251 requires. The Commission noted that the conditions are not "intended to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271, and 272, or the Commission's rules . . . ."[27] The Commission added that its adoption of the conditions "does not signify that, by complying with these conditions, Bell Atlantic/GTE will satisfy its nondiscrimination obligations under the Act or commission rules."[28] Thus, Verizon cannot rely on compliance with the merger conditions as a defense to its contravention of Section 251(c). Verizon clearly recognized this fact by inserting a "savings clause" provision in the Merger Conditions to protect the merger in the event that the purported exemption from Section 251(c)(4) was declared invalid.[29]

If the Commission were to excuse Verizon's non-compliance with Section 251(c)(4) by granting this application, it would be allowing a condition proposed by Verizon for the purpose of allaying the Commission's concerns regarding the anti-competitive effects of the merger to trump a statutory requirement. The separate affiliate condition was specifically designed to

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[26] *AT&T Corp. v. FCC,* No. 99-1538 (D.C. Cir. 2000).
[27] *BA/GTE Merger Order* at ¶ 253.
[28] *Id.*
[29] A further indication of this is Verizon's statement in its April 6th letter that "responsibility for the provisioning of ADSL service for resale will be transition[ed] to the separate data affiliate." If Verizon truly felt that the merger conditions ended its resale obligations for DSL service, it would have so stated, but it did not.

provide "a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services."[30] The condition has, however, been used by Verizon to have the opposite effect. It has been used to effectively deny A.R.C. and other CLECs the ability to resell advanced services. Moreover, the statutory provision that was trumped, Section 251(c), is one that the Commission explicitly stated it did not have the authority to forbear from applying.[31]

Verizon's provisioning of resold DSL service, or lack thereof, has clearly violated section 251(c)(4)'s requirements. This means that Verizon has failed to satisfy Checklist Item 14 and is not eligible for Section 271 authority in Massachusetts.

IV. THE COMMISSION NEEDS TO CONDITION ANY FUTURE SECTION 271 GRANT FOR VERIZON ON SATISFACTION OF ITS RESALE OBLIGATIONS

Not only should the Commission deny Verizon Section 271 authority in Massachusetts, it should specify that any future grant of such authority is conditioned on Verizon meeting its resale obligations in regard to advanced services. In its recent *Line Sharing Reconsideration Order*,[32] the Commission stated that facilitating the ability of competitors to provide voice and data service on the same line will further speed the deployment of competition in the advanced services market.[33] The Commission noted that these combined voice and data offerings are

[30] *BA/GTE Merger Order* at ¶ 261.
[31] *ASCENT*, slip op. at pp. 2-3.
[32] *Deployment of Wireline Services Offering Advanced Telecommunications Capability, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 01-26 (2001) ("*Line Sharing Reconsideration Order*").
[33] *Id.* at ¶ 23.

especially attractive to residential and small business customers.[34] A.R.C. is seeking to provide such integrated product offerings to small to medium-sized business customers, and to a lesser extent residential customers, but has been heretofore precluded by Verizon's actions from doing so. The Commission noted that the provisioning of integrated services, such as those A.R.C. seeks to provide, "increases consumer choices by making it possible for carriers to compete effectively with the combined voice and data services that are already available from incumbent LECs and through line sharing arrangements."[35]

Consumers in Massachusetts have been denied these choices by Verizon's restrictions on resale of DSL service. These choices were further limited by Verizon's refusal to provide for line splitting of loops leased to competitors in conjunction with a UNE-P arrangement.[36] Meanwhile, Verizon provides for line sharing on loops over which it provides voice service, thus placing competing providers of voice and data services at a distinct competitive advantage.[37] The Commission, recognizing the unfairness of this situation, has mandated that carriers must allow competitors to order line splitting immediately, and that it expects Bell Operating Companies to demonstrate, in the context of Section 271 applications, that they permit line splitting.[38] The Commission should similarly specify that the same is expected in regard to resale of DSL services.

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[34] *Id.*
[35] *Id.*
[36] CC Docket No. 00-176, Opposition of the Association of Communications Enterprises at p. 11 (Oct. 16, 2000).
[37] *Id.*
[38] *Line Sharing Reconsideration Order* at ¶ 20, n. 36.

V. CONCLUSION

For the foregoing reasons, the Commission should deny Verizon's application for Section 271 authority in Massachusetts.

Respectfully submitted,

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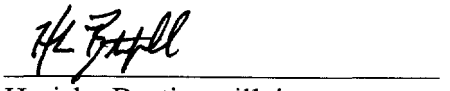
February 6, 2001

CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on February 6, 2001, I caused to be served upon the following individuals the Comments of A.R.C. Networks, Inc. in CC Docket 01-9:



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